

of May, and on the 25th of June, 1832, was paid by said McCormick with money which he admits, in his answer, he received from the Hammonds two days before, but, as he avers, with no knowledge of their business or indebtedness. The Hammonds petitioned for the benefit of the insolvent laws in September and October, 1832. The complainant seeks the repayment of this \$5000, on the ground that it was paid to the bank in fraud of these laws. John L. Hammond, one of the partners, and the only witness in the case, proved that, about the 21st of May, 1832, when they had not available means to pay their debts, an arrangement was made by witness, his brother and clerk, and said McCormick, to pay the bank the note in question out of bills due the firm. That witness objected to this arrangement, because they expected to compound with their creditors, and he did not wish to give a preference to one over another, but to make an equal distribution of assets among their creditors. It was HELD—

That this proof was not sufficient to establish that this preference was given with a view, and under any expectation, on the part of the Hammonds, of taking the benefit of the insolvent laws, and was not, therefore, void under the insolvent system of this state.

This transaction, occurring prior to the act of 1834, chap. 293, must be shown to be void, if void at all, under the act of 1812, chap. 77, sec. 1, or the act of 1816, chap. 221, sec. 6.

At common law, a debtor in failing circumstances has an unquestionable right to secure one creditor to the exclusion of others, either by payment or a *bona fide* transfer of his property. The *onus probandi* is therefore upon the party who seek to disturb such preference to show that it is prohibited by our insolvent system.

The vitiating intent may be established by circumstantial proof: but such proof is entitled to less influence when it is manifest that direct evidence upon the question was within reach.

#### THE CHANCELLOR:

The bill in this case seeks to compel the defendants, or one of them, to pay to the complainant, as the permanent trustee of the Hammonds, the sum of \$5000, which it alleges was paid to the bank in fraud of the insolvent laws.

It appears that the Hammonds, as partners in trade, became indebted to the bank, for money borrowed, in the sum of \$5000, for which, on 21st of February, 1832, they gave their note, signed in the partnership name, payable to the bank, by its corporate name, sixty days after date; that this note not being paid, and the partnership being dissolved, a new note, signed by the partners in their individual names, was given at its maturity, the 24th of April following, payable to the cashier of the bank in twenty-eight days. That when the first note was